JAN 11 2001 (9)

No. 00-454

Supreme Court, U.S.
FILED
JAN 11 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF *AMICUS CURIAE* INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

MICHAEL E. WEBSTER
Counsel of Record
NEIL G. WESTESEN
CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH P.L.L.P.
490 North 31st Street, TW II
P. O. Box 2529
Billings, MT 59103-2529
(406) 252-3441

Attorneys for Amicus Curiae Interstate Natural Gas Association of America

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

21 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THIS COURT SHOULD REVERSE THE TENTH CIRCUIT BECAUSE IT FAILED TO CONDUCT A PROPER INQUIRY INTO WHETHER THE NAVAJO NATION HAD JURISDICTION TO IMPOSE ITS TAX	6
A. The Power to Tax Cannot Be Exercised Over Persons or Property Located Outside The Jurisdiction of a Tribe	6
B. This Court Has Set Forth a Straightforward Approach to Determine Whether an Indian Tribe May Properly Exercise Civil Jurisdiction, Including Taxing Jurisdiction, Over Non-Indian Parties Engaged in Business Activities on Non-Indian Owned Land Or Its Equivalent	8
C. The Ninth Circuit Court of Appeals' Decision in *Big Horn County Electric Cooperative Inc. v. Adams* Reflects a Proper Application of This Court's Jurisdictional Principles	13
D. The Tenth Circuit's Analysis in *Atkinson* is Fatally Flawed And The Balancing Test Advanced Therein Cannot Be Reconciled With *Montana* And Its Progeny	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page

Atkinson Trading Company Inc. v. Shirley, 210 F.3d 1247 (10th Cir. 2000) ..... *passim*

Big Horn County Electric Cooperative, Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000) ..... *passim*

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) 10, 16

Louisville & Jeffersonville Ferry Company v. Commonwealth of Kentucky, 18 U.S. 385, ____, 23 S.Ct. 463, 467 (1903) 7

M'Culloch v. State of Maryland, 17 U.S. (4 *Wheat*) 316, 429 (1819) 6

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) ..... *passim*

Montana v. United States, 450 U.S. 544 (1981) .... *passim*

South Dakota v. Bourland, 508 U.S. 679 (1993) 10, 12, 16

St. Louis v. The Ferry Company, 78 U.S. (11 *Wall*) 423, 429 (1870) 7

Strate v. A-1 Contractors, 520 U.S. 438 (1997) .... *passim*

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 6, 10, 14

STATUTES

15 U.S.C. § 717 *et seq* 1

18 U.S.C. § 1151 ..... 16, 17

25 U.S.C. § 323 *et seq* 2

MISCELLANEOUS

S.Ct. R. 37.6 1

INTEREST OF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") respectfully submits this brief in support of the Petitioner, Atkinson Trading Company, Inc., and its efforts to obtain a reversal of the Tenth Circuit Court of Appeals' decision in *Atkinson Trading Company Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000).[1]

INGAA is a non-profit national trade association comprised primarily of interstate natural gas pipeline companies regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act ("NGA").[2] Member companies operate approximately 200,000 miles of natural gas pipelines, together with related facilities, within the United States, and INGAA's members account for more than 90% of all natural gas transported and sold in interstate commerce within the United States.

There are approximately 55 million acres of Indian land located within the United States. As a consequence of the location of this land, a number of INGAA member pipeline companies have portions of their pipeline systems, and certain related pipeline facilities, located within the boundaries of Indian reservations. The routes utilized by these pipeline companies were selected on the basis of engineering and environmental factors, and the natural gas pipelines located along these routes have been designed and

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than amicus curiae and its members, made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and a joint letter evidencing their consent is on file with the Office of the Clerk of this Court.

[2] 15 U.S.C. § 717 et seq.

constructed to effectively transport natural gas within the United States from areas of production to areas of use. The efficient and uninterrupted accomplishment of this transportation function is essential to both the economic well being of the United States and the physical well being of the vast majority of its citizens. Because of the nature of the business carried out by the members of INGAA, and the importance of that business to our country, the transportation activities and the operational functions of INGAA's members are subject to extensive oversight by FERC.

For those pipelines which pass through Indian reservations, INGAA's members are required by federal law to obtain from the United States grants of rights-of-way over those tracts of Indian land which lie within the pipeline route. Most often, these rights-of-way are granted under the authority of the General Right-of-Way Act of 1948. 25 U.S.C. § 323 *et seq.* Tribal governments often assert jurisdictional authority over the on-Reservation portion of these pipelines. One area of jurisdictional authority of particular interest to INGAA and its members is the asserted power of Indian tribes to levy and collect taxes on those pipelines and pipeline facilities located within the exterior boundaries of Indian reservations. As captive taxpayers who are unable to easily relocate their natural gas pipelines, the level and extent of tribal taxation is of particular importance to those members of INGAA who are subject to tribal taxes. Thus, any decision which appears to expand the scope of a tribe's taxing authority, particularly one that allows or supports the right of a tribe to tax a non-Indian pipeline or activity which occurs within or upon non-Indian owned fee land or its equivalent, is of critical importance to INGAA.

INGAA has a substantial interest in seeing the Tenth Circuit's decision herein reversed for a number of reasons. INGAA, as a national trade association, has a strong interest in ensuring that its members are subject to taxation only

where the taxing entity possesses the proper jurisdictional authority and power to tax. INGAA believes that this Court's precedent establishes that Indian tribes lack the jurisdictional authority to tax a non-Indian party in connection with business activity taking place on fee land or its equivalent and not significantly involving a tribe or its members except under certainly narrowly defined circumstances. *Montana v. United States*, 450 U.S. 544 (1981). Since the Court has determined, in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that federal rights-of-way granted to non-Indians are to be equated with fee lands for purposes of determining tribal jurisdiction, INGAA has a direct interest in any case which would extend a tribe's taxing authority over non-Indians conducting activities on fee land or its equivalent.

INGAA also seeks confirmation for its members, and indeed for all non-Indian parties who conduct business on fee property or its equivalent within an Indian reservation, that the taxing jurisdiction of an Indian tribe is synonymous with, but not superior to other jurisdictional powers possessed by a tribe. The Ninth Circuit Court of Appeals, in *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), carefully and correctly applied this Court's precedent regarding the exercise of a tribe's jurisdiction over non-Indian parties and concluded that an Indian tribe lacks jurisdiction to impose a tax on the interests of a utility located within a federally granted right-of-way across Indian trust lands. The Tenth Circuit's inconsistent decision in this regard is reflective of, and results from, an incorrect jurisdictional analysis which ignored the clear standards which this Court has laid out for determining tribal jurisdiction over non-Indians.

INGAA's members have pipelines located in both the Ninth and Tenth Circuits, as well as in circuits which have not yet considered, in light of *Strate*, the jurisdictional authority of an Indian tribe to tax a non-Indian party doing

business within reservations on fee property or its jurisdictional equivalent. It is of great importance to INGAA's members that all federal courts properly apply the straight-forward jurisdictional guidelines developed by the Court's holding in cases like *Montana*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Strate*. This confirmation will help to insure consistency in any analysis of the extent and nature of tribal jurisdiction to which a non-Indian party may properly be subject, whether it be jurisdiction to tax, to zone, to license or to adjudicate disputes.

The Tenth Circuit's holding in *Atkinson* that the Navajo Tribe can tax non-Indian guests staying at a hotel on non-Indian land, and the jurisdictional inquiry undertaken to reach this conclusion, failed to consider the important jurisdictional limitations which apply to tribal action involving fee lands or their equivalent. The Tenth Circuit's analysis in *Atkinson* is inconsistent not only with the precedent of this Court, but also with the Ninth Circuit Court of Appeals decision in *Big Horn County Electric Cooperative*. INGAA thus has an interest in, and supports the efforts of the Petitioner herein to obtain a reversal of the Tenth Circuit's decision.

SUMMARY OF ARGUMENT

This Court's previous decisions establish that any governmental entity seeking to impose a tax must have jurisdiction over the property or activity being taxed before the tax is valid and enforceable. The precedent of this Court over the last 20 years, coupled with the decisions of other federal courts which have properly applied the precedent of this Court, has served to clarify, and set within more narrow and precise boundaries, the extent to which an Indian tribe may assert any form of civil jurisdiction, including jurisdiction to tax, over a non-Indian party doing business upon on-reservation, non-Indian fee land or its equivalent.

The Tenth Circuit's unique balancing test for determining the scope of a tribe's taxing authority over non-Indians who are engaged in activity on fee lands or its equivalent cannot be reconciled with the decisions of this Court, nor decisions of other federal courts which have considered the jurisdictional authority of tribes in contexts similar to that presented in *Atkinson*. The Tenth Circuit's balancing test seemingly will allow tribes to tax non-Indian parties under an inquiry that gives little consideration to the principles that have been at the center of this Court's Indian jurisdiction cases, while at the same time considering, for purposes of jurisdiction, the asserted needs for, and/or uses to be made of, tribal tax revenue. Such a test would legitimize the notion that a tribe can "earn" jurisdictional authority to impose a tribal tax on a non-Indian party by the appropriate utilization of the tax revenue received, or by implementing a tax with a tax rate small enough to escape a "finding" that the tax creates a "disproportionate" burden on the taxpayer. Such a determination lacks support in the law and highlights the Tenth Circuit's failure to adequately consider the threshold issue of whether the Navajo Tribe had jurisdiction to tax Atkinson in light of this Court's clear and overriding rules concerning the scope of tribal jurisdiction over non-Indians. The Tenth Circuit's failure to properly apply this Court's precedent and the practical implications of what its "balancing test" will mean justifies reversal by this Court.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE TENTH CIRCUIT BECAUSE IT FAILED TO CONDUCT A PROPER INQUIRY INTO WHETHER THE NAVAJO NATION HAD JURISDICTION TO IMPOSE ITS TAX

A. The Power to Tax Cannot Be Exercised Over Persons or Property Located Outside The Jurisdiction of a Tribe

INGAA recognizes that the right of a tribe to tax "transactions occurring on trust lands and significantly involving a tribe or its members" is an essential element of a tribe's inherent sovereignty. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980). This power provides a means for funding essential governmental services while also serving as a tool for territorial management. *See Merrion v. Jicarilla Apache Tribe*, 455, U.S. 130, 137 (1982). However, this power, like all sovereign powers of a tribe, is limited in scope, and extends only to the limits of a tribe's jurisdictional authority.

The power of a sovereign to tax was considered nearly two centuries ago by this Court in *M'Culloch v. State of Maryland*, 17 U.S. (4 *Wheat*) 316, 429 (1819), wherein Chief Justice Marshall noted:

> It is obvious, that it (the power to tax) is an incident of sovereignty, and is coextensive with that to which it is an incident. *All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.* This proposition may almost be pronounced self-evident. (Emphasis added.)

Similar pronouncements have been repeated as this Court has analyzed the taxing jurisdiction of various governmental

entities. *See, Louisville & Jeffersonville Ferry Company v. Commonwealth of Kentucky*, 18 U.S. 385, ____, 23 S.Ct. 463, 467 (1903) ("While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government.")

This point was particularly well made in *St. Louis v. The Ferry Company*, 78 U.S. (11 Wall) 423, 430 (1870), wherein this Court stated:

> Where there is jurisdiction neither as to the person nor property, the imposition of a tax would be ultra vires and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. *Jurisdiction is as necessary to a valid legislative as to valid judicial action.* (Emphasis added.)

The above rulings by the Court establish a number of important considerations in considering the scope of any government's power to tax. First, and foremost, the power to tax is subject to jurisdictional limitations which must be satisfied before a tax may properly be imposed. Where the requisite jurisdiction is lacking, so, too, is the power to tax. In addition, it is clear from the rulings of the Court that the power to tax is a legislative power and thus is subject to those jurisdictional limitations which apply to legislative actions. The power to tax is but one of the sovereign powers of a tribe and as such it is subject to the jurisdictional limitations which have been applied to tribes in their efforts to assert civil jurisdiction over non-Indians. Proper application of these

jurisdictional limitations evidences that the general civil jurisdiction of a tribe does not extend to non-Indian parties who are engaged in business activities on fee lands or its equivalent within a reservation. Consequently, the power to tax such activities, which is co-extensive with, but not superior to the other jurisdictional powers of a tribe, is lacking.

B. This Court Has Set Forth a Straightforward Approach to Determine Whether an Indian Tribe May Properly Exercise Civil Jurisdiction, Including Taxing Jurisdiction, Over Non-Indian Parties Engaged in Business Activities on Non-Indian Owned Land Or Its Equivalent

Both the nature and the extent of tribal sovereignty have been addressed numerous times in the last two decades by the Court. In reviewing these decisions, a number of controlling principles have developed which lead to the conclusion that the Tenth Circuit's decision in *Atkinson*, and the balancing test formulated therein, improperly deviates from the Court's precedent, misapplies the jurisdictional test set forth in *Montana*, and should therefore be reversed.

In 1981, this Court decided the seminal case of *Montana v. United States*, 450 U.S. 544, which undertook an extensive review of tribal civil jurisdiction over non-Indians, with particular emphasis on tribal attempts to regulate the activity of non-Indians occurring on fee lands. In *Montana*, this Court determined that the Crow Tribe lacked sufficient jurisdiction to regulate the on-reservation hunting and fishing by nonmembers of the Tribe where the activity occurred on fee lands. In reaching its decision, the Court, noting the diminished status of tribes as sovereigns, concluded that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so

cannot survive without express congressional delegation." 450 U.S. at 564. The Court made clear the general proposition that the "inherent sovereign powers of an Indian tribe do not extend to nonmembers of the Tribe." 450 U.S. at 565.

In *Montana*, this Court recognized that tribes may, in certain instances, exercise tribal civil jurisdiction over non-Indians, even where Congress has not expressly authorized such exercise and no specific treaty otherwise guarantees such jurisdiction. These narrowly defined circumstances were described as follows:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. 450 at 565-566 (citations and footnote omitted).

The starting point of any analysis of tribal civil jurisdiction over non-Indians begins with *Montana* and the presumption that in the absence of express Congressional authorization to the contrary, an Indian tribe lacks jurisdiction to assert civil authority over non-Indians related to their activities or property located on fee lands. This presumption also holds true for non-Indians in connection with their activities conducted within or upon lands which are the equivalent of fee lands for jurisdictional purposes. *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Therefore, an Indian tribe

which seeks to assert jurisdiction over non-Indians on non-Indian owned fee land or its equivalent has a heavy burden to show that the tribe is not subject to the general presumption that the tribe lacks such jurisdiction.[3]

Another case of particular relevance is *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion*, this Court considered the Jicarilla Apache Tribe's right to enforce a severance tax against non-Indian oil companies on any "oil and natural gas severed, saved and removed from *Tribal* lands . . . ." 455 U.S. at 133 (emphasis added). The Jicarilla Apache Tribe's reservation, located in northwestern New Mexico, is comprised *entirely* of lands held by the United States in trust for the Tribe. *Id.* In upholding the right of the Jicarilla Apache Tribe to impose its severance tax, the Court looked to its prior decision in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), which held that the "power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 152.

In *Merrion*, the non-Indian lessees were found to be within the scope of the Tribe's taxing jurisdiction based on their direct contractual dealings with the Tribe and because all of

---

[3] In this regard, this Court's decision in *South Dakota v. Bourland*, 508 U.S. 679 (1993) is instructive, inasmuch as *Bourland* forcefully notes that "tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' (citing *Montana*) 450 U.S. at 564, and is therefore *not* inherent." 508 U.S. at 695, n. 15 (emphasis in original). *See also, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 430 (1989) (Opinion of Justice White.) "The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal court, to regulate the use of fee land."

the non-Indian oil company's business within the Reservation was conducted on tribal lands. In the Court's words:

> [A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power. *A tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.* 455 U.S. at 141, 142. (Emphasis added.)

The Court's opinion in *Merrion* repeatedly refers to the "jurisdiction" of the tribe and the need for the taxed activity to be within the tribe's jurisdiction. In *Merrion*, all activities of the non-Indian parties involved took place on Indian trust land pursuant to oil and gas leases entered into directly with the tribe. Given these facts, the Court determined, with three justices dissenting, that tribal jurisdiction to tax did exist. *Merrion*, not surprisingly, contains no reference to *Montana* and the jurisdictional presumption against tribal jurisdiction present in *Montana*. However, it seems self-evident that this omission resulted from the factual circumstances in *Merrion*, and not because of any unique or special treatment given by the Court to the taxing power of a tribe. Where, as in *Merrion*, the activity to be taxed involves activities directly involving a tribe and occurring only on Indian trust land, *Montana* has no factual application.

The most recent decision of this Court directly governing the issues in this case is the unanimous opinion in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *Strate* soundly reaffirmed the *Montana* analysis for considering the scope of

tribal "civil authority" over non-Indians. *Id.* at 446. In addressing the adjudicatory jurisdiction of tribes over non-Indians on non-Indian fee land or its equivalent, this Court amplified on the broad application of *Montana*, stating:

> While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of "inherent sovereignty." Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non-Indians." As to nonmembers, we hold, *a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.* Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. *Subject to controlling provisions in treaties and statutes, and the two exceptions identified in Montana, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "does not extend to the activities of nonmembers of the tribe."* 520 U.S. at 438 (internal citations to *Montana v. United States* omitted). (Emphasis added.)

The power to tax necessarily flows from a tribe's "legislative jurisdiction" and is thus part of a tribe's "civil authority." However, *Montana* in plain and unambiguous terms made clear that the inherent sovereign powers of a tribe do not, in general, extend to non-member activity on non-Indian owned fee land. *Bourland* brought this point home by concisely stating that in the absence of express Congressional delegation, tribal sovereignty over non-Indians is not inherent. *Strate* further reinforces this principle both as to fee land and its equivalent. Since a tribe's taxing authority is merely one of the legislative powers which comprise a tribe's civil authority, and because the power to tax exists only where the taxing entity has jurisdiction over the activity,

person or property to be taxed, it is clear that the Navajo tribe cannot properly impose its tax on the guests of Atkinson.

C. The Ninth Circuit Court of Appeals' Decision in *Big Horn County Electric Cooperative Inc. v. Adams* Reflects a Proper Application of This Court's Jurisdictional Principles

In *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000), the Ninth Circuit was presented with the issue of whether the Crow Tribe of Indians had the jurisdictional authority to assess an ad valorem tax against the utility property of a non-Indian electric cooperative where that property was located within the boundaries of federally granted rights-of-way which had been obtained by the cooperative across Indian lands. The analysis which the Ninth Circuit employed in reaching the determination that the Crow Tribe lacked the necessary jurisdictional authority to impose its tax reflects a proper application of the jurisdictional guidelines provided by this Court.

In *Big Horn County Electric Cooperative*, the Ninth Circuit first recognized the importance of determining whether the Tribe's actions were directed at property located on fee land or its equivalent. As the Ninth Circuit stated, "The United States Supreme Court has stated on several occasions that an Indian tribe's jurisdiction over nonmember conduct on non-Indian fee land is extremely limited." *Id.* at 949. The Ninth Circuit then looked to *Strate* and to another decision of the Ninth Circuit and concluded, consistent with these cases, that the cooperative's federally granted rights-of-way across Indian lands were "the equivalent of non-Indian fee land for the purpose of considering the limits of the Tribe's regulatory jurisdiction." *Id.* at 950.

Having concluded that the Crow Tribe's taxes were thus directed at property located within rights-of-way that were jurisdictionally the equivalent of fee land, the Court then

observed that "post-*Strate* jurisprudence leaves no doubt that *Montana's* framework applies in determining a tribe's jurisdiction over nonmembers on non-Indian fee land." *Id.* The Ninth Circuit then acknowledged that under *Montana's* main rule, "a tribe has no civil regulatory authority over tribal nonmembers." *Id.* at 951. The Court then turned its analysis to the two *Montana* exceptions.

The Ninth Circuit first considered whether the electric cooperative had any consensual relationship which would support the Crow Tribe's taxing efforts, and determined that there existed no consensual relationship of a kind or type required to support the Tribe's tax. The Court then considered whether the second exception outlined in *Montana* would supply the requisite nexus for the Tribe's taxing efforts, and again the Ninth Circuit concluded that this exception was not met. The Ninth Circuit rejected the Crow Tribe's argument that because revenues generated by the tax financed important tribal services, the tax was essential to the Tribe's well being and thus fell within the second exception. In considering and rejecting this argument, the Ninth Circuit noted that this Court has indicated that the second *Montana* exception is to be narrowly construed, and that the Tribe's "request for us to expand *Montana's* second exception would effectively swallow *Montana's* main rule, because virtually any tribal tax would thus fall under the second exception, a result that the Supreme Court has never endorsed and which conflicts with the Supreme Court's view that tribal jurisdiction is limited." 219 F.3d at 951.

Finally, citing *Merrion* and *Washington v. Confederated Tribes of the Colville Indian Reservation* the Ninth Circuit rejected the Crow Tribe's argument that its inherent sovereign authority permitted the Tribe to impose its tax free of the *Montana* rule. In rejecting this argument, the Ninth Circuit noted that while "both cases contain broad language regarding tribal taxation powers, neither case abrogates

Montana's main rule." 219 F.3d at 952. In its analysis of these cases, the Ninth Circuit noted that both cases focused on the power of a tribe to tax property or activity occurring on Indian land, and that both cases actually contain language lending support to the proposition that an attempt to reach beyond tribal lands would be an "impermissible extension of tribal jurisdiction." The Ninth Circuit further concluded that the reference to several taxation cases in the *Montana* opinion effectively undercut any argument that tax cases were somehow not subject to *Montana's* main rule.

The Ninth Circuit's decision in *Big Horn County Electric Cooperative* illustrates the correct analysis that should be undertaken by a court presented with the issue of whether a tribe's jurisdiction to tax can be extended to non-Indians doing business on non-Indian lands within a reservation. Such an analysis squares with the principles on tribal jurisdiction which have been articulated and clarified by decisions of this Court over the last 20 years. Clearly, the Tenth Circuit's meandering and disjointed analysis bears little resemblance to the Ninth Circuit's straightforward application of the decisions of this Court. The Tenth Circuit's opinion plainly highlights the dangers of straying from the proper application of *Montana's* "pathmarking" analysis.

D. The Tenth Circuit's Analysis in *Atkinson* is Fatally Flawed And The Balancing Test Advanced Therein Cannot Be Reconciled With *Montana* And Its Progeny

The Petitioner, in the Legal Argument portion of its brief, has well demonstrated the legal errors in the analysis employed by the Tenth Circuit. Each of the errors noted by the Petitioner in and of itself are sufficient to justify a reversal of the Tenth Circuit, and collectively they demonstrate plainly the confusion and unending promise of continuing litigation that will certainly flow from the Tenth Circuit's

failure in *Atkinson* to follow the clear legal precedents established by this Court.

The Tenth Circuit found a consensual relationship existing between Atkinson's lodgers and the Navajo Tribe based on a theory of implied consent. *Atkinson*, 210 F.3d at 1261-1263. According to the Tenth Circuit, those lodgers consented to the jurisdiction of the Tribe by their mere presence on the Navajo Reservation. If that were true, then there is no need to conduct the *Montana* analysis in the first place, since any exercise of jurisdiction by a tribe directed against nonmembers found within the exterior boundaries of a reservation would seemingly be authorized simply by their being located within the Reservation. *Montana's* main rule cannot be so easily sidestepped or its consensual relationship exception so broadly expanded. Plainly, if the implied consent notion were an appropriate concept for determining jurisdiction, the outcome of *Montana, Brendale, Bourland* and *Strate* would have been different.

A similar problem exists with the Tenth Circuit's reliance upon the "Indian country" definition of 18 U.S.C. § 1151 to support its conclusion that "Congress, in the exercise of its plenary authority, has determined that all lands within the outer bounds of the reservation are within Indian County and are therefore subject to reasonable tribal authority." *Atkinson*, 210 F.3d at 1258. This statement again evidences a clear misunderstanding of the nature of this federal statute, as well as disregard for the teachings of *Montana* and its progeny. The purpose of 18 U.S.C. § 1151, as enacted by Congress, was to determine the scope of federal criminal jurisdiction. Thus, this statute evidences no Congressional intent whatsoever to extend tribal *civil* jurisdiction to all non-Indians within a Reservation. Further, *Montana*, *Bourland*, *Brendale*, and *Strate* each support the proposition that non-Indian owned fee land is not, solely by virtue of its location within a reservation, subject to "reasonable tribal authority."

In fact, each holds quite to the contrary. Once again, *Montana's* main rule may not be so easily avoided. Clearly 18 U.S.C. § 1151 has no application to the issue in this case.

The Tenth Circuit's balancing test also fails to comport with this Court's jurisprudence on tribal civil jurisdiction over non-Indians. If the Tenth Circuit's decision is permitted to stand, tribal jurisdiction over non-Indians may seemingly be exerted wherever or whenever a tribe can point to some potential benefits flowing from the Tribe to the party being impacted by tribal action. This test, in practical effect, ignores the *Montana* rule and its exceptions, and replaces them with a test which, in all but the most egregious situations, would support tribal jurisdiction.

The decisions of this Court on Indian jurisdiction over non-Indians cannot be squared with the analysis of the Tenth Circuit. Furthermore, the Tenth Circuit's balancing test, if upheld, will effectively overrule those principles of Indian jurisdiction which have been developed by this Court to clearly limit the scope of tribal jurisdiction over non-Indian parties. Under current law tribes are presumed to lack the power to impose taxes or otherwise assert civil jurisdictional authority over non-Indians relative to activities occurring on non-Indian owned fee land or its equivalent. The decision of the Tenth Circuit deviated from the settled law of this Court, and thus should be reversed.

CONCLUSION

The balancing test adopted by the Tenth Circuit to determine whether a tribe should be allowed to tax a non-Indian party begs the question of whether there exists tribal jurisdiction to support such action in the first instance. To conclude that a tribe can impose a tax based, even in part, upon the benefits to be obtained from the revenue generated by the tax, brings into the jurisdictional inquiry matters which have no bearing on jurisdiction, and suggests that jurisdiction

can be earned by the taxing entity provided the entity makes proper use of the tax revenues it receives. Under the analytical framework set forth by this Court, as properly applied by the Ninth Circuit Court of Appeals in *Big Horn County Electric Cooperative*, it is clear that the Tenth Circuit's analysis was flawed and failed to examine the jurisdictional reach of the Tribe's taxing power in light of the clear limitations which this Court has defined in regard to such power. For the reasons stated above, this Court should reverse the Tenth Circuit's decision.

Respectfully submitted,

MICHAEL E. WEBSTER
Counsel of Record
NEIL G. WESTESEN
CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.
490 North 31st Street, TW II
P. O. Box 2529
Billings, MT 59103-2529
(406) 252-3441

Attorneys for Amicus Curiae
Interstate Natural Gas Association
of America

January 11, 2001